Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

GEORGE E. FASSNACHT,
Petitioner,

v.

THE CITY OF PHILADELPHIA,
A Municipal Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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May 2, 1994

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QUESTION PRESENTED

I. For purposes of § 1983 does a cause of action accrue at the time a potential plaintiff achieves vindication under state law?

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PETITION FOR A WRIT OF CERTIORARI

George E. Fassnacht ("Fassnacht"), through his undersigned counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals, in *Fassnacht v. City of Philadelphia*, No. 93-1549 (3d Cir. 1994), affirmed by judgment order (A-1 to A-3) the unreported decision of the United States District Court for the Eastern District of Pennsylvania in *Fassnacht v. City of Philadelphia*, No. 91-07863 (E.D. Pa. 1993) (A-4 to A-21).

STATEMENT OF JURISDICTION

The judgment order of the Court of Appeals was entered on January 31, 1994 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The due process clause of the Fourteenth Amendment of the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pa. R. Crim. P. 324, Motion for Return of Property, states:

> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of Common Pleas for the judicial district in which the property was seized.
>
> (b) The Judge having such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is

contraband, in which case the court may order the property to be forfeited.

(c) A motion to suppress evidence under Rule 323 may be joined with a motion under this Rule.

STATEMENT OF THE CASE

A. Factual Background

Petitioner George E. Fassnacht started his training as a firearms expert during his military service at the Ordnance Technical Intelligence Service in 1953 to 1956. He later held a City of Philadelphia Civil Service position as civilian firearms examiner for the Philadelphia Police Department from 1962 to 1967, when he joined the Central Intelligence Agency to perform duties as a firearms and ordnance expert. Like many professional firearms examiners, Fassnacht

maintained a large reference collection of firearms, ammunition, firearms' accessories, spare parts and a large technical library.

Before going abroad on an assignment in Southeast Asia in July 1968, Fassnacht carefully stored his reference collection in the basement of his house in Philadelphia, with the firearms placed in special wrapping paper supplied to him by the Government.

On June 21, 1971, while Fassnacht was overseas, the City of Philadelphia seized Fassnacht's reference collection and later brought criminal charges against him. In December 1973, Fassnacht was acquitted and immediately requested in writing the return of his property.

In January 1974, the prosecutor wrote that Fassnacht's property would be returned to him with the exception of a few items that the City believed were contraband per se, but on March 27, 1974, the prosecutor sent a second letter stating that the City Solicitor had conditioned the return of Fassnacht's property on his relinquishing any claims he had against the City.

Fassnacht declined to agree to the City's demand that he release all his claims against the City. In April 1974, he filed a petition to establish his right to the property as required by Pennsylvania Rule of Criminal Procedure 324 (quoted supra at 2-3).

On June 6, 1975, without having afforded Fassnacht a hearing, the Court

of Common Pleas held that Fassnacht had failed to establish his right to possess the property and ordered the collection destroyed pursuant to a federal statute which gave exclusive enforcement jurisdiction to the federal courts. The Common Pleas decision was affirmed by the Superior Court of Pennsylvania and review was denied both by the state Supreme Court and by this Court. Fassnacht nonetheless pursued a second and in 1989 a third effort to obtain relief from the 1975 order. On December 21, 1989, the Court of Common Pleas struck as "void" the 1975 order and ordered the property to be returned to Fassnacht.

B. Procedural Background

On December 19, 1991, within the applicable two-year statute of limitations if his cause of action accrued at the time of entry of the 1989 order vindicating his rights under state law to possess the property but many years late if his cause of action had accrued in 1974, Fassnacht sued the City. His claims asserted under Section 1983 were based both on the denial of a hearing and the allegation that the City had a policy to condition return of property seized by the Police on an agreement by the owner to release the City of all claims and that such a policy was a violation of his right to substantive due process for which the municipal corporation was directly liable. The City's motion to dismiss,

alleging statute of limitations and other defenses, was denied by the District Court.

In a trial in February 1993, Fassnacht testified to his life-long profession as a firearms examiner, currently pursued principally as an expert witness in civil and criminal cases. A law professor and other witnesses testified to the City of Philadelphia policy in 1975 to require general releases from persons seeking the return of property or other action in their favor. Other experts testified to the loss in value of Fassnacht's property as the result of both intentional and negligently caused damage to firearms and ammunition and the total disappearance of Fassnacht's technical reference library.

The City presented no evidence.

The District Court ruled that Fassnacht's procedural due process claim would not be submitted to the jury. The District Court, allowed Fassnacht's substantive due process and equal protection claims to be submitted to the jury. The jury determined that the decision was made by the City Solicitor and was part of a standard policy. The jury also determined that the reason the City refused to return Fassnacht's firearms reference collection was because he refused to agree to the City's demand and that this policy served no legitimate governmental purpose and was arbitrary and unreasonable. The jury returned a verdict for Fassnacht of $260,600, which was dollar-for-dollar the total

of the loss of value caused by the City to the reference collection as testified by the expert witnesses.

On May 6, 1993, the District Court reconsidered its earlier ruling on the City's statute of limitations defense and granted the City's post-trial motion for judgment, concluding that Fassnacht's cause of action against the City had accrued in 1974 (A-18) and not in 1989 when he finally vindicated his right under state law to possess the property. Following a timely appeal, the District Court's judgment was affirmed by a judgment order of the Court of Appeals (A-1).

REASONS FOR GRANTING THE PETITION

I. Review should be granted in order that this court may answer the recurring question whether a potential § 1983 plaintiff, whose claim is dependent upon vindication of a liberty or property interest under state law, must file a federal suit before a state court vindicates the plaintiff's property or liberty interest.

The question of whether a potential § 1983 plaintiff, whose claim is dependent upon a vindication of a liberty or property interest under state law, must file a federal suit before a state court vindicates the property or liberty interest has not yet been answered by this Court. As discussed below the answer has important ramifications for developing jurisprudence. Petitioner respectfully suggests that the correct answer was provided by Justice Ginsburg in her concurrence in *Albright v. Oliver*, 114

S. Ct. 807 (1994), when she stated, "[t]he time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit . . . ."

Justice Ginsburg also cited Judge Guy's concurrence in *McCune v. Grand Rapids*, 842 F.2d 903, 908 (6th Cir. 1988), for the proposition that where the existence of the § 1983 cause of action is dependent upon the outcome of a state proceeding it makes no sense to require the plaintiff to file a federal suit before his liberty or property right is established under state law.

> Where . . . innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant.

114 S. Ct. at 816 (citing *McCune v. Grand Rapids*, 842 F.2d 903, 908 (6th Cir. 1988) (Guy, J., concurring in result).

Judge Guy pointed out that there are three ways[1/] the federal courts can approach the question of how to treat a potential § 1983 action which is dependent upon the outcome of a state proceeding: 1) treat the § 1983 action as viable before vindication and abstain pending resolution of the

---

1/ The Third Circuit decision produces a fourth route not considered by Judge Guy because this case involved a forfeiture proceeding, which, unlike federal procedures and the procedures in many states, required the plaintiff to bring suit, rather than the state. The Third Circuit opinion will unnecessarily create additional § 1983 actions in the federal courts and involve the federal courts in issues that should be decided by the state courts. A cautious plaintiff today would bring a § 1983 action against the City in federal court in order to recover his property rather than follow the procedure provided by the state system.

related state proceeding keeping the case alive on the docket; 2) dismiss the case without prejudice pending vindication and allow the dismissal to toll the limitations period (otherwise dismissal would not protect the plaintiff from the running of a limitations period); or 3) recognize that a § 1983 cause of action does not accrue until vindication in the state courts. *McCune*, 842 F.2d at 909.

The impetus of Judge Guy's approach was to control the number of § 1983 claims flooding the federal courts. Id. at 908. Judge Guy reasoned that under any of the three approaches there was a possibility that a federal court would one day find itself litigating a very old claim but the advantage of requiring vindication is that it would

keep district court dockets free of old cases that are inactive. Id. at 909. Furthermore, as pointed out by Judge Guy, there is a possibility that after vindication a potential plaintiff will never bother to file suit, whereas if he already had a suit pending, he may be more likely to pursue it. Id.

While the vindication requirement has the laudatory result of reducing the number of § 1983 suits in the federal courts, it also promotes justice. In this case, it would compensate a man for the damages caused to his property by an unconstitutional governmental policy. It also has the attributes of being legally sound and intellectually honest.

The District Court questioned whether Fassnacht's procedural due

process claim was timely, but in any case ruled that as a matter of law it would not submit the claim to the jury. (A-17). The Court also held that Fassnacht had the obligation to bring his § 1983 cause of action (substantive due process claim) in federal court for statute of limitation purposes even though the holding by the state court that Fassnacht had no interest in the property would have been res judicata for purposes of his federal action. See *Reimer v. Smith*, 663 F.2d 1316 (5th Cir. 1981) ("Because Reimer is estopped from claiming a property interest in the car crusher, he could not, as a matter of law, succeed on a § 1983 claim based on a deprivation of the car crusher. One cannot be deprived of property without due process unless one

has a property interest in the thing allegedly taken away.")

The District Court offered no explanation for the potentially dichotomous result of a timely procedural due process claim and a time barred substantive due process claim, but an explanation can be found in *Zinermon v. Burch*, 494 U.S. 113, 125-126 (1990), where this Court stated that a substantive due process claim actionable under § 1983 is complete when the wrongful action is taken, but a procedural due process claim is not complete unless and until the State fails to provide due process. The substantive due process component of the due process clause includes those specific protections defined in the Bill of Rights and incorporated into

the due process clause and a component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Id. It is only where there is doubt as to the "innocent" nature of the property or liberty involved in the later component of substantive due process which is at issue here. Stated more simply — was Fassnacht required to bring his substantive due process claim in federal court before the state court determined whether Fassnacht had a legal right under state law to possess his firearms reference collection or, to the contrary, that the collection constituted contraband per se. If the holding of the District Court was correct, then a cautious future

plaintiff, in a position similar to Fassnacht's, will file a federal civil rights suit even though he only wishes at that point to have his property returned to him. The federal courts will either replace the state courts as the focal point of this type of litigation or the federal courts will abstain. If the federal courts abstain, it is an implicit recognition of an exhaustion requirement which this Court has rejected, or at the very least an implicit requirement that a state court must first determine the existence of liberty or property interests under state law.

Unless the federal courts wish to replace the state courts as the initial determiner of "innocence," there should be a recognition that a potential

plaintiff's § 1983 cause of action does not accrue until a state court vindicates the innocence either of the plaintiff, or as in this case, the innocence of the plaintiff's possession of property and his ownership of that property.

Furthermore, under the holding of the District Court, a plaintiff effectively has no federal remedy where he is a victim of a court decision which is later voided. If, on the other hand, Fassnacht's cause of action did not accrue until the state court finally struck as void the original state court opinion and held that he was entitled to the return of his property, then justice delayed is not justice totally denied. The facts presented here are highly unusual and

reversal of the Third Circuit order will not produce a new wave of § 1983 litigation; indeed, as Judge Guy argued, it will help to reduce needless litigation in the federal courts.

II. Sound policy supports a holding that petitioner fassnacht's § 1983 claim did not accrue until he achieved vindication in the state courts of the property interest on which his § 1983 claim was dependent.

An improper forfeiture implicates the Fourteenth Amendment. See *U.S. v. Daniel Good Real Property*, 510 U.S.__, __, 114 S. Ct. 492, 499 (1993). In order to establish a cause of action under 42 U.S.C. § 1983, for unconstitutional deprivation of property, a plaintiff must establish that defendants, acting under color of state law, deprived him of a constitutionally recognized property

interest without due process of law or in violation of the equal protection clause of the Fourteenth Amendment.

"It is well-established that the Fourteenth Amendment itself does not create property interests. 'Rather, they are . . . defined by existing rules or understandings that stem from an independent source such as state law . . . '" *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992), citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In analyzing a constitutional claim, the court must first examine whether the plaintiff has a recognizable right under state law. See, e.g., *Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983) ("The starting point for our inquiry is to determine whether state law or local

law afforded Scott a protectible property interest . . . sufficient to trigger federal due process guarantees.") Fassnacht could not bring a cause of action in federal court until he could establish a protectible property interest under state law, i.e., until the court ordered the property returned to him in December 1989. Under federal law, Fassnacht's cause of action did not accrue until he could prosecute the action to a successful conclusion. The plaintiff in *Snell v. Short*, 544 F.2d 1289 (5th Cir. 1977), brought a § 1983 action seeking the return of money taken from him at the time of his arrest. The District Court held that the statute of limitations barred plaintiff's action. The Fifth Circuit

vacated and remanded. The Fifth Circuit held that Snell's action could accrue only after the police lost the protection of Tex. Crim. Pro. Code Ann. art. 47.01 (Vernon 1966) or until the police were ordered to return the money by a court. 544 F.2d at 1291. Cf. *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105, 108 (3d Cir. 1983) (cause of action accrued only when it could be prosecuted to a successful conclusion, not when the plaintiff first knew or should have known of the alleged fraud).

Proof of a property interest under state law is an essential element of a § 1983 claim for wrongful deprivation of property. Just as a plaintiff cannot maintain a cause of action for malicious prosecution until the

underlying action is terminated in his favor, Fassnacht could not maintain his § 1983 cause of action until a state court held that he was entitled to the return of his property under state law. Fassnacht's § 1983 cause of action did not accrue until that underlying requirement was met.

Rather than focusing on the question of the vindication of Fassnacht's property rights by the state court in 1989, the District Court assumed that because Fassnacht had standing to bring a motion for the return of property under state law he therefore had a sufficient property interest to sustain a § 1983 claim. The District Court's analysis of Fassnacht's property rights consisted of the following:

> Certainly, he also had a property interest in the guns and ammunition illegally seized from him by the police. The applicable Pennsylvania Rule of Criminal Procedure previously referred to (Rule 324) permitted a person aggrieved by search and seizure to move for the return of the property on the ground that he was entitled to lawful possession of it.

(A-19) The District Court offered no analysis of what Fassnacht's property rights were under state law. Ironically, the court's statement that Fassnacht could avail himself of the proceeding provided for in Pa. Rule Crim. P. 324 to seek the return of his property supports Fassnacht's point that he had to utilize Rule 324 in order to establish sufficient property interests under state law to support a constitutional claim.

By its failure to analyze either Rule 324 or Fassnacht's property rights

under state law, the District Court confused the degree of interest necessary to confer standing and the property interest necessary to raise a constitutional challenge under the Fourteenth Amendment. Cf. *Daniel Good Real Property*, 510 U.S.__, __, 114 S. Ct. 492, 501 ("The seizure deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing.")

Moreover, under Pennsylvania law, the individual must prove a right to lawful possession of the items seized

before the burden shifts to require the Commonwealth to show that the items are contraband. See *Commonwealth v. Stipetich*, 424 Pa. Super. 539, 523 A.2d 360 (1993) ("On a motion for return of property, the moving party has the burden of proving ownership or lawful possession of the items. . . . The burden then shifts to the Commonwealth to prove, by a preponderance of the evidence, that the property is contraband.") (citation omitted). Following arguments made in conference in chambers from which Fassnacht was excluded, the Court of Common Pleas ruled that Fassnacht had failed to prove ownership of the firearms reference collection, stating:

> No evidence of the ownership of any of these items, or, for that matter, any of the items in the Commonwealth's possession has been

> produced. Petitioner has made bald allegations that the items taken from his home are his. This in itself is not enough.

Fassnacht v. Commonwealth, Court of Common Pleas at Misc. Div., No. 74-00-2013 (June 6, 1975) (Hirsh, J).

As a result of other misrepresentations made in chambers, the Court of Common Pleas also held that the property was contraband per se. This holding deprived Fassnacht of a legitimate claim of entitlement until the court's order was struck as void on December 21, 1989.

It was not until the Court of Common Pleas ordered the return of the reference collection in December 1989 that Fassnacht finally had a sufficiently complete ownership interest under state law to assert a

deprivation of "property" without due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1549

GEORGE E. FASSNACHT,
Appellant

v.

CITY OF PHILADELPHIA;
MORTON SOLOMON, individually
and in his former capacity
as Deputy Commissioner and
Commissioner of the Police
Department of the City
of Philadelphia and other
unknown City officials and
unknown Philadelphia police
officers

Appeal from the United States
District Court for the Eastern
District of Pennsylvania
D.C. Civil Action No. 91-07863
(Honorable Ronald L. Buckwalter)

Argued January 19, 1994
Before: SLOVITER, Chief Judge,
SCIRICA and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered May 6, 1993, be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

Attest:

_____
P. Douglas Sisk, Clerk

A TRUE COPY:

EILEEN GORDON ROTH,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

GEORGE E. FASSNACHT, Plaintiff,	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, Defendant.	:	NO. 91-7863

M E M O R A N D U M

BUCKWALTER, J. May 5, 1993

On February 5, 1993, the jury empaneled in the above case returned a verdict in favor of the plaintiff in the amount of $260,600 and against the City of Philadelphia. The cause of action against the other defendant, Morton Solomon, individually and in his capacity as Deputy Commissioner of the Philadelphia Police Department, was

dismissed. Defendant has filed post-trial motions under Federal Rule of Civil Procedure 50(b) averring numerous errors on the part of the court, the first of which is:

> 1. The District Court erred by denying defendant, City of Philadelphia's motion for judgment as a matter of law because the plaintiff's federal cause of action was time barred under the applicable Pennsylvania statute of limitations.

As a starting point, both sides agree that the applicable statute of limitations would be two years. It is the date upon which plaintiff's action accrued that is the point of contention, the defendant believing it accrued in March of 1974; the plaintiff, in December of 1989.

The following factual background is necessary for an understanding of defendant's statute of limitations argument.

On June 24, 1971, the plaintiff was arrested, pursuant to a warrant, on charges of possession of machine guns and explosives. Prior to the arrest, on June 20, 1971, the police had conducted a warrantless search of the basement area of his residence at 528 Rhawn Street, Philadelphia, removing various firearms and in excess of 300,000 rounds of ammunition.

Plaintiff 's motion to suppress the evidence seized during the warrantless search was ultimately granted as to the evidence taken from 528 Rhawn Street. At a subsequent

trial, the plaintiff was found not guilty as to certain items seized at another location and a demurrer was sustained as to the 528 Rhawn Street items.

Plaintiff's attorney at that time, A. Charles Peruto, Esquire, asked the assistant district attorney in charge of the case to return all the property taken from plaintiff. Peruto was advised that the Commonwealth had no objection to the return of the property. However, by letter dated March 27, 1974, plaintiff was advised by an assistant district attorney that the property would be returned but "that there would be no further action. (See Notes of Testimony 2/3/93, p. 30).

Peruto understood this to mean that the property would only be

returned to plaintiff if plaintiff agreed to a general release in favor of the Philadelphia Police Department.

It is at this point, when plaintiff received the letter in March of 1974 that, the City argues, he had full knowledge that his substantive due process rights were violated.

Interestingly, the plaintiff appears to come to the same conclusion in the pretrial memorandum filed on his behalf which, at page 22, states as follows:

> The City's attempt to excuse its conduct due to a court order issued months after its unconstitutional tort is temporally and legally facetious. The constitutional wrong was completed on March 27, 1974.

A series of court orders form the basis for plaintiff's argument that the statute of limitations did not

begin to run until December, 1989. Those orders came about because plaintiff refused to execute a general release as a condition to the return of his weapons.

The remedy available to plaintiff through applicable state procedures was to file a petition for return of property, which he did on April 19, 1974. Ultimately, the petition for return was denied by the Honorable Ned Hirsch, Court of Common Pleas of Philadelphia, by order dated January 6, 1975.

Plaintiff appealed to the Superior Court of Pennsylvania and on February 18, 1977, the order of Judge Hirsch was affirmed except as to certain knives, swords and machete. In

authoring the opinion of the court, Superior Court Judge Spaeth said:

> On this record we have no difficulty in concluding that the lower court was justified in finding by a preponderance of the evidence that appellant (plaintiff) had engaged in unlicensed dealing in violation of the Gun Control Act. It follows that the pistols, rifles, weapon parts, and ammunition magazines and clips were contraband, per se,. . . .

All appeal avenues from the above decision were taken by plaintiff, including petition for certiorari to the Supreme Court of the United States, but to no avail. Thereafter, according to plaintiff's brief in opposition to a motion to dismiss, plaintiff

> . . . pursued a second attempt in the Court of Common Pleas to obtain an order to permit the return of his property, by presenting an affidavit from the witness that defendant said would make certain representations

> denying that he was going to make those representations. Judge Hirsch simply reaffirmed his earlier order. When Judge Hirsch was no longer in the Court of Common Pleas, Fassnacht again applied for relief to the Court of Common Pleas. In December, 1989, the Court of Common Pleas struck the original order as void ab initio and ordered Fassnacht's property returned to him. - p. 15, Plaintiff George E. Fassnacht's Memorandum of Law in Opposition to Defendant's Motion to Dismiss.

When the city offered Fassnacht no compensation for the property that it had held since the initial search and seizure in 1971, and in some instances lost or severely damaged since then, this present suit was filed on December 20, 1991, timely if the statute of limitations began to run from the entry of the order of the

Court of Common Pleas aforesaid on December 21, 1989.

The accrual of the cause of action as of December 21, 1989, is appropriate, plaintiff argues, because only then did he have a property right to his property (the firearms and ammunition) under state and federal law. In other words, plaintiff had no protectable interest in order to invoke the Fourteenth Amendment until the order of December 21, 1989, directing that the property be returned to him.

The city's position, in contrast to plaintiff's, is that a cause of action accrues and the statute of limitations begins to run when a plaintiff knows or has reason to know of the injury which forms the basis of his complaint. In other words, the

constitutional violation for which plaintiff sued, namely, the refusal of the city to return his guns, occurred in March, 1974. Moreover, the city argues, the existence of a property interest or right, the indispensable requisite to a cause of action under plaintiff's theory, was determinable at the time of the violation in March of 1974.

Plaintiff is correct, of course, when he argues that he must have "a protectable" liberty or property interest in order to invoke the protection of the Fourteenth Amendment." *Winsett v. McGinnis*, 617 F.2d 996 (3d Cir. 1980). He is also correct when he submits that "it is a rule of general application that a cause of action for the recovery of

damages accrues only when it could be prosecuted to a successful conclusion." *Baron v. Allied Artists Pictures Coro.*, 717 F.2d 105 (3d Cir. 1983).

But, these correct statements of law do not in my judgment sustain plaintiff's position relative to when his cause of action for the alleged substantive due process violation occurred. Plaintiff was also proceeding upon the theory that his procedural due process rights were violated, but at the conclusion of plaintiff's testimony and during my instructions to the jury, I ruled as a matter of law that plaintiff's procedural due process rights were not violated. (Notes of Testimony, 2/5/93, p. 65). Neither party has filed a

post-trial motion with respect to that ruling.

Plaintiff's substantive due process argument and its relationship to the December 20, 1989 order is somewhat difficult to analyze. I am consoled by the statement in *Reich v. Beharry*, 883 F.2d 239 (3d Cir. 1989):

> While, as we have discussed above, it is well settled that state-created property interests, including some contract rights, implicate the protection of the procedural aspect of the due process clause, the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court and is subject to varying analyses and conclusions by the lower courts.

In the final analysis, it seems to me that plaintiffs due process argument falls into two categories. The first is procedural. That is to

say that since his procedural due process rights were violated by the hearing proceedings before Judge Hirsch as declared by the December 21, 1989 order, the plaintiff is entitled to relief and furthermore, this claim is timely because it could not be filed until such a ruling was made. In other words, a state court had to declare that plaintiff's procedural rights were violated before plaintiff would have the requisite property interest to file a civil rights claim under the Fourteenth Amendment. *Snell v. Short*, 544 F.2d 1289 (5th Cir. 1977) gives some support to this proposition.

The holding in was as follows:

> Under Texas law, an officer in possession of property alleged to have been stolen cannot release the property except upon the order of a court or magistrate. An

> officer's lawful possession of property under Article 47.01 during the pendency of a criminal prosecution does not become wrongful simply because demand has been made for return of the property. Thus, a Texas court would not have held the police conduct here to have been a conversion at the point when the officers refused Snell's wife's demand for the return of money. The conversion action could accrue only after the police lost the protection of Article 47.01. (Citations omitted).

The analogy which plaintiff wants this court to make to the Snell case is that no cause of action could have accrued to plaintiff in this case until the police no longer had the protection of the order ruling that plaintiff's gun's were contraband.

Whether that is an appropriate analogy is questionable. It is of no consequence, however, in light of my ruling that as a matter of law no

procedural rights of plaintiff were violated in this case. However, plaintiff's position is, I believe, that even for the alleged substantive due process claim, he had no property interest on which to base it until the December 21, 1989 order was entered.

If, as plaintiff alleges, the substantive due process rights arose from the alleged arbitrary and capricious policy of the city with regard to its insistence that one gives up his or her rights to sue before returning property to the one from whom it was improperly seized or held, this violation of substantive due process clearly occurred in March of 1974. The testimony at the trial in this case makes it clear that on or about March 27, 1974, the plaintiff knew or had

reason to know of the injury to his property resulting from the city's alleged violation of his constitutional rights in failing to return the property to him unless he signed a release. (See Notes of Testimony 2/3/93, pp. 165-170).

Certainly, he also had a property interest in the guns and ammunition illegally seized from him by the police. The applicable Pennsylvania Rule of Criminal Procedure previously referred to (Rule 324) permitted a person aggrieved by a search and seizure to move for the return of the property on the ground that he was entitled to lawful possession of it. The city by its alleged unconstitutional policy was denying plaintiff, as the person

aggrieved by a search and seizure, the possession of the property wrongfully seized.

Based upon the foregoing, the city's motion will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

GEORGE E. FASSNACHT, Plaintiff,	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, Defendant.	:	NO. 91-7863

O R D E R

AND NOW, this 5th day of May, 1993, upon consideration of defendant City of Philadelphia's motion for judgment as a matter of law after trial, and any response thereto, it is hereby ORDERED and DECREED that the defendant City of Philadelphia's motion is GRANTED, and the plaintiff's cause of action is DISMISSED with prejudice.

BY THE COURT:

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RONALD L. BUCKWALTER, J.